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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972.

72-459 and 72-620. 459, 620.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMAN and KATHERYN L. KRETZMAN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR. and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN,

Appellees.

Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES.

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OPINION.

On July 21, 1972, the three-judge District Court granted Appellees' (plaintiffs below) Motion for Summary Judgment based on an Opinion of April 6, 1972, which denied Appellants' (defendants below) Motions to Dismiss. That Opinion is reported at 346 F. Supp. 1356 (E. D. Pa. 1972) and is in the Appendix beginning at page 37a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, Amendment I, as applicable to the States by the Fourteenth Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

Constitution of the United States, Amendment XIV:

> "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

Parent Reimbursement Act for Nonpublic Education Act 92 of the Laws of Pennsylvania, 1971, P. L. —, Pa. Stat. Ann., Tit. 24, § 5701, et seq. (Supp. 1972) (hereinafter, the Act). The Act is set forth in the Appendix, commencing at page 56a.

QUESTIONS PRESENTED.

1. Does the Pennsylvania Parent Reimbursement Act for Nonpublic Education (Act 92 of the Pennsylvania General Assembly, August 27, 1971), which at the end of a school year would reimburse parents of nonpublic school children all or a portion of the tuition paid at a nonpublic school, violate the Establishment Clause of the First Amendment to the United States Constitution either because it subsidizes religious education or because it has a primary effect which advances religion or because it fosters excessive political entanglement?

2. Does the Act violate the Free Exercise Clause of the First Amendment to the United States Constitution?

3. Did appellees (plaintiffs below) have standing to assert that the Act additionally violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that it perpetuated and promoted the segregation of the races?

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STATEMENT OF THE CASE.

The Commonwealth of Pennsylvania enacted the Parent Reimbursement Act for Nonpublic Education on August 27, 1971 (App. 56a). Under the Act parents of nonpublic students are reimbursed $75 for elementary school tuition and $150 for secondary school tuition.

On September 13, 1971, Appellees filed their Complaint alleging that the Act violated the Establishment, Free Exercise and Equal Protection Clauses of the Constitution. Thereafter, parents of children attending sectarian and nonsectarian nonpublic schools in the State intervened as parties defendant.

All defendants moved to dismiss the Complaint for failure to state a claim for relief. On April 6, 1972, the three-judge District Court denied those motions (App. 56a). On April 28, 1972, the Court granted motions of the defendants to dismiss those counts of the Complaint relating to the Free Exercise and Equal Protection Clauses (App. 64a).

After all defendants filed answers, plaintiffs moved for summary judgment. That motion was granted on July 21, 1972 and the Court, relying on its previously filed Opinion of April 6, 1972, permanently enjoined the State Treasurer from paying any funds to parents of children attending nonpublic schools.

SUMMARY OF ARGUMENT.

Tuition reimbursement to parents of parochial school children at the end of the school year, constitutes impermissible government aid of parochial education.

Whether tuition moneys are paid to parents or to schools is not significant, for in either case the result is that religion has been advanced. Government may no more help parents advance religion than it may help churches do so. Conversely, where government aid does not advance religion, and avoids entanglement, it may be paid to religious institutions directly. *Tilton v. Richardson*, 403 U. S. 672 (1971).

Whether reimbursements are made at the beginning or the end of the school year is also not significant, and the argument that the recipients are free to spend the reimbursement in any way they choose will not withstand judicial scrutiny. Act 92 speaks to parents at the *beginning* of the year, and tells them that *if*—and only if—they send their children to nonpublic schools, they will receive tax moneys at the end of the year. The statutory promise thus encourages parents to send their children to and pay tuition to parochial schools, and thereby advances religion.

Act 92 fosters political entanglement and divisiveness, precisely as did the Pennsylvania statute invalidated by this Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). As noted by the lower Court in *Wolman v. Essex*, 342 F. Supp. 399 (S. D. Ohio 1972), this is particularly the case with statutes whose direct beneficiaries are a particular portion of the population comprised in the main of persons of a single religion. For the foregoing reasons, the lower Court was correct in holding that Act 92 violates the Establishment Clause of the First Amendment.

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The lower Court dismissed the Counts in the appellees' Complaint which averred that Act 92 violated the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The use of tax funds for the advancement of religion violated the religious consciences of appellees, and the freedom from being taxed for religious purposes is fundamental to the whole concept of religious freedom. Furthermore, Appellee Lemon, a parent of a black child in a public school, had standing and should have been permitted to prove that Act 92 fosters racially segregated schools.

ARGUMENT.

I. PARENT REIMBURSEMENT ACT FOR NONPUBLIC EDUCATION SUBSIDIZES SECTARIAN INSTRUCTION, HAS A PRIMARY EFFECT WHICH ADVANCES RELIGION, AND FOSTERS EXCESSIVE POLITICAL ENTANGLEMENT, AND THEREFORE VIOLATES THE ESTABLISHMENT CLAUSE.

Introduction.

If there is any doctrine in constitutional law that can be said to be definitively settled, it is that an unrestricted grant of governmental funds to a school which has as a dominant or substantial purpose sectarian instruction or religious worship violates the Establishment Clause of the First Amendment (as well as the constitutional, statutory or decisional law of every State in the Union). We know of no court, judge or constitutional authority who has expressed a contrary view. Hence, if the Parent Reimbursement Act for Nonpublic Education ("Act 92") provided simply that at the end of the school year the State would pay *to each such school* the sum of $150 for each high school pupil and $75 for each elementary pupil, the Act would be clearly unconstitutional on its face.

The appellants in the present case do not contend the contrary. Their sole attempted justification of the constitutionality of the Act rests upon the provision that the sum be paid not directly to the school but to the parent of the pupil on production of a receipted tuition bill at the end of the school year. The question to be decided by this Court then is whether the constitutional prohibition against governmental financing of religious instruction and practices can be avoided by the tuition reimbursement mecha-

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nism. If the answer to this question is yes, it would not merely elevate form over substance, but would make the Establishment Clause ineffective to prevent state support of religious education and worship in schools.

A. State Support of Parochial Education Generally, as Distinguished From the Support of Non-Educative Services and Secular Educational Services Provided by Such Schools, Has Always Been Regarded as Unconstitutional, From the Beginning of Our Nationhood to the Present Time, by Every Justice Who Has Addressed Himself to the Subject.

In the footnotes are cited the cases and historical background establishing that the use of tax monies for sectarian teaching was the very issue which gave rise almost two centuries ago to Virginia's Bill for the Establishment of Religious Freedom, the forerunner of the establishment clause;[1] that later, as a result of divisive struggles in many

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1. In 1784, there was introduced into the Virginia Colonial Legislature, "A bill Establishing a Provision for Teachers of the Christian Religion." *Everson v. Board of Education*, 330 U. S. 1 (1947), Supplemental Appendix at p. 72 (Dissenting Opinion), ("Everson"). It sought to resume the payment of "tithes" which had been suspended in 1777. By its terms, the taxpayer could designate the sect whose Teacher or Minister his tax payment would support, and in the absence of such designation, the fund would be used "for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever." That Bill so outraged James Madison that he composed and circulated his famous "Memorial and Remonstrance Against Religious Assessments" in which he said:

> Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever? Appendix, *Id.* at 65-6.

The Memorial and Remonstrance won the day and the Bill was defeated in 1785. Because "tithes had been the life blood of establish-

states throughout the 19th century, the prohibition of State support for religious instruction "became the guiding principle, in law and feeling, of the American people";[2] and that still later, and repeatedly in the last twenty-five years, this Court and various state Supreme Courts, stated and restated that the First and Fourteenth Amendments bar

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1. (Cont'd.)

ment," this date, and the earlier date when such payments were first suspended (1777), are variously described as the date of disestablishment of the Anglican Church in Virginia. There was then enacted Thomas Jefferson's Bill for Establishing Religious Freedom, the forerunner to the First Amendment. The Preamble to that Bill stated "that to compel a man to furnish contribution of money for the propagation of opinions which he disbelieves is sinful and tyrannical . . ." *Everson, dissent supra* at pp. 33-41 n. 33.

2. "As the momentum for popular education *increased and in turn evoked strong claims for State support of religious education*, contests not unlike that . . . in Virginia . . . appeared in various forms in other States. * * * In New York, the rise of the common schools led . . . to the barring of tax funds to church schools, *and later to any school in which sectarian doctrine was taught*. * * * The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. * * *"

"Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, *the basis of the restriction is the whole experience of our people*. * * *" *McCollum v. Board of Education*, 333 U. S. 203, 214, 215 (1948) (concurring opinion of Mr. Justice Frankfurter) (emphasis supplied).

In the 1868 edition of *Cooley, Constitutional Limitations*, he states (at p. 469):

"Those things which are not lawful under any of American constitutions may be stated thus:—

* * *

"2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary."

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the use of tax funds for the support of any institution which teaches sectarian doctrine.[3]

3.

1947—"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson, majority, supra,* note 1 at p. 16.

"New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Id.*

"It [the purpose of the First Amendment] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question." *Everson, dissent, supra,* note 1 at pp. 31-32.

". . . the Amendment forbids any appropriation large or small, from public funds to aid or support any and all religious exercises." *Id.* at 41.

1952—"Government may not finance religious groups . . ." *Zorach v. Clauson,* 343 U. S. 306, 314 (1952).

1955—A tuition reimbursement law was held in 1955 by a unanimous Virginia Supreme Court to violate the First Amendment, in these words:

"The payment of such items to sectarian schools as directed or authorized by the terms of Item 210 is unconstitutional because, (1) it utilizes public funds to support religious institutions contrary to the principles laid down in *Everson v. Board of Education, supra,* 330 U. S., at page 16, 67 S. Ct., at page 511; (2) It 'affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery,' condemned in *McCollum v. Board of Education,* 333 U. S. 203, 212 S. Ct. 461, 466, 92 L. ed. 649; (3) It compels taxpayers to contribute money for the propagation of religious opinions which they may not believe. See *Protestant Episcopal Education Society v. Churchman's Representatives,* 80 Va. 718, 885; *Jones v. Commonwealth,* 185 Va. 335, 344, 38 S. E. (2d) 444, 448." *Almond v. Day,* 197 Va. 419, 430 (1955).

Until recently, general subsidization of parochial schools by way of tuition or teachers' salary payments or across-the board grants of any kind was very much the exception. The landmark cases in the main have concerned statutes granting only limited aid for certain non-educational, or secular educational, services. Thus, a bare majority of the Supreme Court held in *Everson*[4] that bus transportation, while on the "verge" of permissibility,[5] is a service which a state may provide to all its children as a general health or safety measure, much like free milk, lunches, nursing services, or dental and eye examinations. While it is true that such state aid may cause parochial schools to save money, that has never been the test of constitutionality.[6]

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3. (Cont'd.)

1960—A unanimous Vermont Supreme Court came to the same conclusion where the State paid the tuition to the schools. *Swart v. South Burlington Town School District,* 122 Vt. 177, 167 A. 2d 514 (1960).

1963—*"The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools."* (emphasis in original) *School District of Abington v. Schempp,* 374 U. S. 203, 229 (1963) (concurring opinion of Mr. Justice Douglas).

1970—"General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz v. Tax Commission,* 397 U. S. 664, 690 (1970) (concurring opinion of Mr. Justice Brennan).

1971—"The Rhode Island Legislature has not and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . ." *Lemon v. Kurtzman,* 403 U. S. 602, 619 (1971) ("Lemon").

4. See note 1, *supra.*

5. *Id.* at 16.

6. *Id.* at 18; *Tilton v. Richardson,* 403 U. S. 672, 679 (1971).

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Later legislative efforts approached the problem differently, and attempted to separate out the secular from the religious educational services in order to provide tax funds for the one but not the other. First, on a "meager record" containing no evidence on the question whether secular textbooks "are used by the parochial school to teach religion," and with three justices dissenting, the Court held that a state may lend secular textbooks to parochial school children. *Board of Education v. Allen* ("Allen").[7]

Next, the Supreme Court dealt with Pennsylvania's attempt to "purchase" secular educational services from private schools and with Rhode Island's effort to supplement salaries of those private school teachers who do not teach religion. With only one justice dissenting, both laws were invalidated.[8] The issue in both cases appeared to be whether the secular and the sectarian in a parochial school are separable, such that the one but not the other could be aided with public funds. But that issue was never joined, for the Court concluded 1) that such aid would be unconstitutional unless the State were *certain* that the subsidized teachers do not inculcate religion, and 2) that the kind of pervasive restrictions and supervision necessary to ensure such certainty would themselves bring about an unconstitutional entanglement between church and state. Thus:

> The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflict. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. * * * These prophylactic contacts will involve excessive and enduring entanglement between state and church.[9]

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7. 392 U. S. 236, 248 (1968).

8. *Lemon, supra* note 3.

9. *Id.* at 619.

Now we have come full circle. Outright grants being clearly unconstitutional, legislatures enacted a number of laws providing fringe benefits such as health services, milk and bus transportation for parochial school children. They then attempted to provide aid for the secular part of the school's educational program but, except for secular textbooks, it was held that our constitution would not permit it. Now, in the instant case, we are confronted with the kind of law which, if constitutional, would have made unnecessary all of the previous legislative efforts. For this law would have the state reimburse all or part of parochial school tuitions. Tuitions are the "very life blood" of a parochial school [10] just as "tithes had been the lifeblood of establishment" of the Anglican Church in Virginia.[11] The one is as profoundly at variance with the whole meaning of the First Amendment as the other. Pennsylvania has done *exactly* what the Court, in the quotation above, said Rhode Island could not do. It has provided aid either on the "mere assumption" that teachers in the aided schools do not inculcate religion, or, worse yet, totally without regard to whether they do or not.

B. Act 92 Constitutes State Support of Parochial Education, and Its Primary Effect Advances Religion.

1. Tuition Payments Directly to Schools and Tuition Payments to Parents Are Constitutionally Identical.

As has been noted, independent of the First Amendment every State in the Union forbids governmental support of religious education. Efforts to avoid this prohibition by means of tuition payments—to institutions and by way of reimbursements to parents—have had a long and uniformly

10. *Almond v. Day,* 197 Va. 419, 427 (1955).

11. *Everson, dissent, supra* note 1 at p. 41.

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unsuccessful history. As stated in 1938 by the New York Court of Appeals in *Judd v. Board of Education:* [12]

> The courts of this country have been unanimous in prohibiting a use of public funds to pay directly or indirectly, tuition fees of pupils in private or sectarian schools.

Typical of the state court decisions is that of the Kentucky Court of Appeals in *Williams v. Board of Trustees,* [13] which held that an arrangement between a public board of education and a sectarian college under which the college was paid tuition fees out of common school funds was a flagrant violation of a constitutional provision that no portion of any funds raised by taxation for education may be used in aid of any church, sectarian or denominational schools.

Nor have there been any changes in state court decision since the New York court spoke in *Judd v. Board of Education.* In *Opinion of the Justices,* [14] the Massachusetts Supreme Judicial Court held in 1970 that a measure providing for payment in the sum of $100 to each child attending an accredited private school in the form of a voucher endorsed by the payee to the school, and providing further that "No allotment shall be used to subsidize courses of religious doctrine or worship," violated a provision in the State constitution against the use of public funds to aid private schools.

In 1971, the South Carolina Supreme Court invalidated a 1970 statute providing for tuition grants to students at nonpublic colleges in the State, holding that the statute violated the State constitutional prohibition against use of

12. 278 N. Y. 200, 215 (1968).

13. 173 Ky. 708 (1917).

14. 259 N. E. 2d 564 (Mass., 1970).

public funds for the support of institutions controlled by religious denominations.[15] In that case the Court said:

> We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid. The fact that only a portion of the tuition costs are covered by the grants from the State affects the matter only in degree. If State funds can be used to provide a portion of the tuition costs for attendance at religious schools, all could just as legally be paid, resulting in the support of such institutions entirely with State funds.

These cases were decided under state constitutional provisions, but these provisions merely state specifically what the United States Supreme Court has consistently held in every Establishment case that has come to it from *Everson* through *Lemon* and *Tilton v. Richardson,* namely, that governmental funds may not be used to finance religious education or worship. In any event, the same result has been reached in three recent federal court decisions (*Wolman v. Essex,* 342 F. Supp. 399 (S. D. Ohio 1972) *aff'd* 93 S. Ct. 61; *Committee for Public Education and Religious Liberty v. Nyquist,* — F. Supp. — (S. D. N. Y. 1972), and the decision in the instant case). All three decisions were by three-judge courts and all were unanimous. Finally, in the two State court cases which have considered the question under the Establishment Clause of the First Amend-

15. *Hartness v. Paterson,* 179 S. C. 2d 997 (1971).

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ment of the Federal Constitution (*Almond v. Day*,[16] and *Swart v. South Burlington School District*[17]), the courts ruled that statutes appropriating public funds to pay the tuition of pupils attending sectarian schools violated the Establishment Clause of the First Amendment.

Our research has failed to uncover a single decision of any court in the United States, Federal or state, upholding the constitutionality of a statute providing for payment—whether to school or parent—of tuition for attendance at religious schools. No such decision is cited in any of the briefs of appellants. The only permissible conclusion is that none exists.

C. The Fact That the Reimbursement Is Made at the End of the School Year Is of No Constitutional Significance.

Appellants argue that the reimbursement feature, and particularly the fact that the reimbursement is received at the end of the school year and may be spent in any way the recipient chooses, makes a difference. The lower courts in both the instant case and in *Wolman v. Essex* spoke to this precise issue,[18] and we will not repeat their conclusions in the body of this brief. We would add only the fact that the Act was passed *before* the school year started and what it told the parents was that *if* they enrolled their children in non-public schools they would receive tax funds at the end of the school year. The *statutory promise* thus encouraged parents to enroll their children in non-public schools. This was in conformity with the very purpose of that Act, which is said to be to aid parents so they will not "be forced by

16. See note 10, *supra*.

17. 122 Vt. 177, 167 A. 2d 514 (1961), *cert. den'd* 366 U. S. 925.

18. 342 F. Supp. 399, 415-417 (S. D. Ohio 1972); opinion of lower court in instant case at Appendix, 49a-55a.

economic circumstances to transfer" their children to public schools and create an "enormous added financial" burden on the public schools (Appendix, 57a). To the degree that purpose is achieved, the *effect* will be that children in private schools will not be transferred to public schools but will remain where they are. It is in this connection that the lower court so correctly observed:

> The state cannot maintain that the Act has the purpose of promoting education by supporting non-public schools and then deny that the effect of the Act is to aid these schools. (Appendix, 52a)

Had it been necessary to make a trial record, it would have been established that in most parochial schools tuitions were either *charged for the first time,* or were *increased by the statutory amounts* in the 1971-1972 school years, and parents were notified that these amounts would be reimbursed by the State at the end of the year. But no such proof is necessary, for even if parochial schools would have charged the same tuition with or without the new reimbursement law it would make no difference. The statutory scheme is such that the State, by promising reimbursement, has encouraged parents to pay tuition to parochial schools and thus has aided the schools. Furthermore, the State has no more power to help or to encourage *parents* to provide a religious education for their children than it has to help church schools to do so. Therein lies an additional weakness in appellants' argument. They focus on the question whether the reimbursement will or will not find its way into the religious school's treasury. Clearly that is not the critical factor. Tax funds may be and often are paid to religious institutions for a variety of purposes. See, e.g., *Tilton v. Richardson, supra.* Because it is substance and not form which must control, the lower Court

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held that there must be an examination into "the character of the aided activity rather than the manner in which aid is given." (Appendix, 51a).

When tax funds are provided for secular text books (*Allen*), the aided activity, absent evidence of misuse of the books, is secular education. When funds are used to pay secular teachers (*DiCenzo*) or to purchase math and foreign language courses (*Lemon*), the aided activity is secular education. When funds are used to build a building for secular use (*Tilton*), the aided activity is secular education. But when tax funds are used to encourage parents to continue to send their children to parochial schools, the "character of the aided activity," i.e., parochial education, is religious. Indeed the aided activity is at the very core of the whole purpose of religious organizations—i.e., the religious education of the young.

It can be argued that in *Everson* the activity which was aided by the bus transportation payments was, arguably, parochial education. But that case went to the "verge" of constitutionality, and the aid was incidental and quite finite. When a state undertakes to pay for bus transportation, there is a self-executing limit to the cost, and that cost will never be anything but a fraction of the total cost of running a school. But when a state undertakes to pay or repay a portion of *tuition*, there is no self-executing limit short of underwriting the entire budget of the school. The only limitation is that which state legislators choose to impose.

We respectfully suggest that if there were a constitutional difference between reimbursed and direct tuition payments, we would be engaged, in Mr. Justice Burger's apt phrase, in a "legalistic minuet" in which form and style is an end in itself. We must rather "examine the form of the relationship *for the light that it casts on the substance.*"[19]

19. *Lemon, supra,* note 3 at p. 614.

The substance of the matter is that whether the State gives $150 per child to the parochial school, or gives it to the parents to give to the school, or reimburses the parents after they have paid it to the school, the State is using tax-raised funds to subsidize parochial education.

D. Act 92 Fosters an Excessive Entanglement With Religion.

1. Administrative Entanglement.

If "administrative entanglement" is absent in Act 92, *it is absent only because the State has abandoned altogether any effort to provide its aid for exclusively secular purposes.* "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."[20] Pennsylvania, in order to avoid administrative entanglement, has stopped trying to be "certain," and has thereby again violated the First and Fourteenth Amendments.

2. Political Entanglement.

Furthermore, the Court in *Lemon* was equally concerned by political entanglements. The entanglement "presented by the divisive political potential of these state programs,"[21] inheres in the new Pennsylvania law exactly as it did in the old and demonstrates how close we really are to the very corruption of our political processes which brought about the First Amendment in the first place.

Many justices in many cases have shown the same acute concern as did Mr. Justice Burger over the divisive political potential of such legislation. In 1917, the Kentucky Supreme Court said that if legislatures were permitted to

20. *Id.* at 619.

21. *Id.* at 622.

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legislate in this sphere, "presently we would have the common schools here and there throughout the state operated in connection with that denominational school that happened to have the largest influence and membership in the particular community where the union was made."[22] Mr. Justice Jackson noted in *Everson*,[23] that the Religious Freedom clauses were intended "above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of the . . . public purse." Mr. Justice Harlan, in *Walz v. Tax Commission of City of New York* ("Walz")[24] commented that "[w]hat is at stake [in applying the First Amendment] as a matter of policy is preventing that kind of degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." And Mr. Justice Black stated in *Allen*,[25] that the establishment clause "was written on the assumption that state aid to . . . religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aid is to that extent a tyranny."

Mr. Justice Burger, in *Lemon*, noted that other forms of vigorous and partisan political debate are healthy manifestations of a democratic government. But somehow political debate over whether to finance religious activities had—in European history, in Colonial history and today—a shriller tone, engendering irrational fears and hate. Our founding fathers were so revolted by that *particular kind* of political division—along religious lines—that they "stripped" the legislature "of all power to tax, to support,

22. *Williams v. Board of Trustees*, 173 Ky. 708 (1917).

23. *Everson*, dissent, *supra* note 1 at p. 27.

24. 397 U. S. 664, 694 (1970).

25. 392 U. S. 236, 254 (1068).

or otherwise to assist any or all religions"[26] and they did so in the very first line of the Bill of Rights.

Judge Rubin, in *Wolman v. Essex, supra,* at 412, 413, noted that the potential for political entanglement is far greater where the class affected by the legislation is narrow and one religious group predominates within that class. He noted that in the cases where constitutionality has been upheld, "religiously affiliated institutions were among a broad class of beneficiaries deriving benefits of a general, broad-based, public policy." Perhaps this is just another way of saying that while laws which subsidize all religions are unconstitutional, laws which in their effect prefer some religions over others are even more abhorrent, because their potential for causing political divisiveness in a multi-religious society is so much greater.

The constitutionality of this law cannot be determined abstractly, as though Pennsylvania were starting afresh and as yet had no public or private schools. The law must be examined for its effect upon the present reality, which is that we have not only public schools but a wide network of private schools; that in the 1965-66 school year, over 95% of Pennsylvania's nonpublic elementary schools were church-related, and of these 88% were Catholic;[27] that a much higher percentage of Catholic school children attend parochial schools than do Jewish or Protestant children; and that a parochial school education is (and is regarded by its religious proponents to be) the most effective means available to the various denominations to maintain adherents to their particular faiths.[28]

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26. *Everson, majority, supra* note 1 at p. 11.

27. Report of Archdiocese, 1969; see also *Statistics of Nonpublic Elementary and Secondary Schools,* Office of Education, U. S. Department of Health, Education and Welfare, OE-20111.

28. See, e.g., Mr. Justice Jackson's dissent in *Everson, supra* note 1 at 22-24; Mr. Justice Douglas concurring in *School District of Abington v. Schempp,* 374 U. S. 203 (1963).

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Given those facts, the potential for political entanglement inhering in this law is obvious. It is no answer to argue that the funds are available to all equally, if they send their children to private schools. For all intents and purposes there *are* no such Protestant schools. At a time in the middle of the nineteenth century, when both knew that government funds would no longer be available to subsidize religious education, Protestant America chose to let their schools become public schools and Catholic America chose to begin the arduous process of building parochial schools. We wonder whether nineteenth century Protestantism would so readily have permitted their schools to evolve into our present public school systems, if they had been able to foretell the future: that after a century or more, when Protestant schools hardly existed, Catholic schools would qualify for state funding, thereby giving Catholicism an enormous advantage in the competition between creeds to win and maintain adherents.

No matter what else the religion clauses may have been intended to prevent, they certainly were intended to keep the heavy hand of government off the competition between sects. European history and our own Colonial history are replete with tragedies occurring when first this sect and then that gained control of the public purse. By virtue of the Religion clauses, once and for all religious ideas, like other ideas, were required to compete in the market place of ideas, entirely without the help of government, i.e., without public funds obtained by the compulsion of our taxing laws. Voluntarism was and is at the heart of the concept. Whether, in such a system, a particular sect would disappear or become the dominant or even exclusive religion of the American people was to be no concern of government. Each was free to try, but by persuasion only, and government could not help them persuade.

It is a fact that a far greater percentage of the funds expended under this law will go to help Catholics persuade their children that Catholicism is best than will go to help Jews or Protestants persuade their children that Judaism or Protestantism is best.

This Court has not addressed itself to the preferential aspects of these kinds of laws, perhaps because the statutes which have been upheld have involved peripheral services and such small amounts of money as to be deemed *de minimus* as they affected the competition among sects. But now we are talking about the reimbursement of tuition, a factor which obviously will affect the decisions of many parents to send or not send their children to parochial schools. We submit that Act 92, as compared to the Pennsylvania statute invalidated in *Lemon*, more closely approaches the worst evils intended to be eradicated by the First and Fourteenth Amendments.

It tends to establish a religion.

It disadvantages, and thus interferes with, other religions.

And, precisely because it has such a preferential effect, its potential for political divisiveness along religious lines is far greater.

E. Act 92 Interferes With Appellee's Free Exercise of Religion and Appellees Have Standing to Raise That Issue.

In assessing the sufficiency of the Second Count of the Complaint based upon the Free Exercise Clause, it should be noted that:

—The Complaint alleges that the Act authorizes payment for the tuition of students in educational institutions which "have as their purpose the teaching, propagation and promotion of a particular

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religious faith, conduct their operations, curriculums and programs to fulfill that purpose . . . [and] are an integral part of the religious mission of the sponsoring church." (Paragraph 10)

—The Complaint alleges that it "is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power to contribute to the propagation of religion . . . (Paragraph 6)

—Act 92 does not limit reimbursement payments to that part of the tuition which covers the cost of secular instruction.

If there is no constitutional or practical difference between a direct grant of governmental funds to religious schools and payment of tuition for attendance (as every court which has passed on the question has held) we have here a classical instance of governmental use of tax-raised funds for the teaching, propagation and promotion of religion.

Fundamental to the concept of religious freedom was the belief that it was destructive of personal freedom to compel any man to pay taxes for religious purposes. In fact, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes. As early as 1644, a tanner named Briscoe in Massachusetts Bay Colony published a phamphlet against the church tax, arguing that such a method of supporting religion was immoral and contrary to justice.[29]

As the Court said in *Everson:*

> These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhor-

29. Cobb, *The Rise of Religious Liberty in America,* p. 170 (1902).

rence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.[30]

The Court then referred to the struggle against the tax levy for religion in Virginia, Madison's *Memorial and Remonstrance* which led to its success, and Jefferson's Statute for Establishing Religious Liberty which was a product of that success. It is significant that much of the *Memorial and Remonstrance* is framed in terms of religious liberty. Indeed, its very opening invokes the freedom of religion clause of the Virginia Declaration of Rights,[31] as does its close.[32] It is significant, too, that de-

30. *Everson, majority, supra,* note 1 at p. 11.

31. "Because we hold it for a fundamental and undeniable truth, 'that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence'." *Id.* at 64.

32. "Because, finally, 'the equal right of every citizen to free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights." *Id.* at 71.

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feat of the tax levy led immediately to the enactment of the Statute for Establishing Religious Liberty, whose principal provision is that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever. * * *" [33]

It is true that the defeated Virginia Bill levying taxes for the support of religious teachers sought to impose a specific tax rather than direct an appropriation from the state's general treasury. This, however, is also true of Act 92. The funds appropriated thereunder do not come from the general treasury but specifically from the cigarette tax.[34] Indeed, in one important aspect Act 92 constitutes an even more serious infringement on religious liberty than the Virginia Bill. Under that Bill each taxpayer had the privilege of designating the religion or denomination to which his tax was to go.[35] A Catholic cigarette smoker in Pennsylvania, however, has no way of insuring that no part of the tax he pays (which over a period of years can be quite substantial, far more so than the "three pence" referred to in the *Memorial and Remonstrance*) will be used to pay for the teaching and propagation of Protestant or Jewish doctrines.

We do not mean to suggest that Act 92 would not violate the Free Exercise Clause if the funds for its effectuation came out of the state's general treasury rather than the cigarette tax. In the complexities of modern society and government, it is often impracticable to impose specific taxes for a specific purpose. Yet the underlying principle

33. *Id.* at 13.

34. We consider it unnecessary to rebut any suggestion that the Free Exercise Clause is inapplicable because nobody is required to buy cigarettes. No such suggestion is made in any of the briefs for dismissal.

35. It is for that reason that the Virginia Statute states "that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern." *Id.* at 13.

is the same; the compulsion is not eliminated simply because no part of the taxpayer's bill is earmarked to finance the appropriation. This was recognized by the Virginia Supreme Court in *Almond v. Day*[36] in its holding that the state's tuition law was unconstitutional on the ground, among others, that it "compels taxpayers to contribute money for the propagation of religious opinions which they may not believe."

This, too, was implicitly recognized by the United States Supreme Court in *Flast v. Cohen*.[37] In that case the Court quoted from *Baker v. Carr*[38] to the effect that standing depends on whether the plaintiff has alleged "a personal stake in the outcome of the controversy." The Court then held that every taxpayer in the United States has such a personal stake to challenge a Federal expenditure out of its general funds alleged to be in support of religious schools and religious instruction. The reason for this is that it is the plaintiff's money, no matter how small in amount, that is being used for the purpose. We submit that it necessarily follows that even if the plaintiff is a general taxpayer rather than, as in the present case, a member of a specific class upon whom the tax is levied, he is being taxed to support religion and therefore has standing to assert the Free Exercise Clause.

It is true that in *Board of Education v. Allen*,[39] the Court rejected a claim under the Free Exercise Clause in a challenge to the constitutionality of the New York secular textbook loan law. But that case is clearly distinguishable for at least the following reasons:

—Since the Court held that the law did not involve the use of public funds for the support of religious

36. See note 10, *supra*.

37. 392 U. S. 83, 99 (1968).

38. 369 U. S. 186, 204 (1962).

39. See note 7, *supra* at p. 249.

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schools or religious teaching, there obviously was no violation of the Free Exercise Clause. In the present case, of course, the funds are being used for the support of religious schools and religious teaching.

—The plaintiffs in that case were not taxpayers and were not suing as such. They were members of a local school board who sued because they were of the opinion that by administering the law they would be violating their oath to uphold the Constitution, and if they refused to administer it they would be removed from office.[40]

—The Court pointed out in *Allen* that the plaintiffs "have not contended that the New York law in any way coerces them as individuals in the practice of their religion."[41] In the present case the Complaint (Paragraph 6) specifically alleges that it "is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power to contribute to the propagation of religion . . ."

II. THE EQUAL PROTECTION CLAIM.

Paragraph 11 of the Complaint alleges that:

The Act on its face and as construed and applied by the defendant authorizes and directs payments for the tuition of students in educational institutions which by purpose or effect segregate students by race, thereby perpetuating and promoting the segregation of races and two separate school systems in Pennsylvania—a public school predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior.

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40. *Id.* at 241 n. 5.

41. *Id.* at 249.

It is a fact, fully substantiated by many studies and of which the Court may take judicial notice, that some religious faiths have only a small percentage of blacks, that the vast majority of blacks are Protestants, far fewer are Catholics, and almost none are Jews. Hence if schools of these faiths limit admission to adherents of their respective faith the effect, although *not* the purpose, of subsidizing such schools is to perpetuate racial segregation as alleged in the Complaint.

Appellants had standing to raise this issue and the lower Court should not have dismissed this Count of the Complaint on the authority of its earlier opinion in *Lemon v. Kurtzman*, 310 F. Supp. 35 (E. D. Pa. 1969).

In this Court's opinion in *Lemon v. Kurtzman*, the racial claim was not passed upon or considered. But Mr. Justice Brennan, in his concurring opinion, stated expressly:

> * * * Appellants allege that the nonpublic schools are segregated in Pennsylvania by race and religion and that the Act perpetuates and promotes the segregation of the races "with the ultimate result of promoting two school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior." * * * The District Court held that appellants lacked standing to assert this equal protection claim. *In my view this was plain error.*[42] (emphasis added)

Mr. Justice Brennan's position, we respectfully submit, is more realistic and more in accord with current constitutional principles and policies than the narrow view of standing expressed by the District Court in *Lemon*.

42. *Lemon, supra*, note 3 at p. 2127.

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Considering the appellee Lemon alone, the Complaint herein (and in *Lemon*) alleges that he is the parent of a black child attending public school in Pennsylvania. It is true that the Complaint does not allege that he sought admission for the child in a nonpublic school and that admission was denied. But is that the sum total of Lemon's interest in the controversy? We respectfully submit that it is not.

Appellee *Lemon* may well prefer not to send his child to a school restricted to children of his faith. He may well wish that the child be educated in a school community which truly reflects pluralistic America, a school in which the child can live and learn together with children of all religious faiths and of none. Does he not have an interest that the public school which the child attends shall not be made racially segregated by the state through the means of subsidizing attendance at virtually all-white nonpublic schools? Assuming that Lemon is a Catholic, may the State of Pennsylvania force him to choose between sending his child to an all Catholic or an all black school? And if it may not, does he not have standing to sue to prevent it?

What is true of Lemon is also true of his white co-appellees. The Complaint alleges that pupils in religious schools must participate in religious instruction and worship. Suppose their consciences forbid this. Must they sacrifice their religious freedom to avoid sending their children to a racially segregated school?

It was not the purpose of those who founded America's religious school systems that they should become places of refuge for whites fleeing blacks. Nor is this the purpose of the religious leaders who strive in a time of mounting educational costs to maintain those systems. And that is also not the purpose of the legislatures which appropriate public funds for the support of religious

schools so that those schools may continue to exist. It is, however, unfortunately the purpose of many *parents*, North and South, who send their children to nonpublic schools. And it is an effect, and increasingly a primary effect, of laws which appropriate tax-raised funds to support or subsidize attendance at such schools.

The effect may well be even more serious. It is not too much to suggest that the preservation of the egalitarian, multiracial and multireligious public school system envisioned by its founders rests upon the outcome of the intense struggle for governmental financing of nonpublic schools. To the extent that the public schools, particularly in urban areas, remain multiracial, the unfortunate explanation is that almost all the white children attending them are members of middle income families who simply cannot afford to pay the tuition and other expenses in nonpublic schools. These middle income white children are the flesh and blood of a multiracial public school system. Should the time come when through increasing governmental support of nonpublic schools either directly or through subsidization of attendance by tuition payments, it will be economically feasible for white middle income parents to send their children to nonpublic schools, the public school system will become the modern day equivalent of the pre-public education charity school—an institution for the children of the poor, most of whom will be members of racial minorities. We will then end up with two school systems—separate and unequal.

We submit that each of the appellees in this suit, as well as all Americans, have vital interests in preventing this from happening. Certainly, then, they have a constitutionally protected interest that government shall not actively participate through the use of its taxing and spending powers in such a tragic development. Therein lies their standing to raise the Equal Protection Clause.

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CONCLUSION.

For the foregoing reasons, appellees request that the judgment of the District Court holding Act 92 unconstitutional, be affirmed.

Respectfully submitted,

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